PARTITION OF A VESSEL IN ADMIRALTY.

That interest in affairs of the sea is not entirely confined to those whose occupations bring them into business relations with vessels, leaks out now and then by the inventories of estates filed in our Probate Court.

It is seldom that an old resident dies in one of our port towns, that you do not find, listed in the inventory of his estate, interests in some old schooners.

Clergymen, too, have been known to take flyers in various kinds of wind-jammers all the way from the little chasers of the sacred codfish to the large carriers of the black diamonds.

Such investments, while generally made to help some friend who is trying to get up a vessel, are frequently made because of a fascination for the sea and to own in a vessel that is trading all around the world, and to watch her ports of entry and discharge, and speculate a bit upon how much she will make if she has a good charter, and shiver a bit if a storm is reported from about where you think she must be.

But it does not seem to make any difference whether the sixty-fourth interest of the schooner is owned by a landsman who built in her for his love of the mystery of the sea and alluring experience of one of his friends who has had good luck in some schooner, or by one who has more or less practical knowledge of vessels and builds in them, more for what he can supply them with, than for the interest he expects to receive from the investment — like sail-makers, drydock men, etc., for all are alike in the idea that if they don't like the management all they have to do is to ask the Admiralty Court to partition the schooner and give them their parts.

During the past few years I have been requested very often by lawyers and laymen to bring a suit to partition this schooner, bark or steamer, and when I have asked how much does your client own, or how much do you own, as the case may be, I have been invariably met by questions like these: "Why, does that make any difference?" "What does that have to do with it?"

The idea that you can ask for the division of a vessel no matter what part you own, no doubt prevails because this is the rule that applies to chattels and real estate, and to vessels if the State Court gives the right to such an action. You may partition a ves-

sel in some of the State Courts if the vessel is within the waters of the state, just as you do chattels, by having a receiver appointed and having the vessel sold. In such cases it is not necessary that the one applying for the receiver should own any particular part of the vessel, but the courts have held that one must own more than one sixty-fourth interest.

But admiralty will not take jurisdiction for the partition and licitation of a vessel unless there are equal part owners who cannot agree and their differences are irreconcilable. Some of my brother lawyers, when they have requested me to act as counsel for them in such matters, have referred me to "Benedict on Admiralty," page 520, which either through some oversight or typographical error intimates that the partition and licitation of a vessel can be brought into admiralty between unequal owners.

The reason why owners must be equal to have the Court take jurisdiction of a licitation and partition suit, must be apparent if one stops to think. If the owners are unequal, the majority can rule and there is no need of a partition; but if they are equal and disagree, neither can compel the other to give way, and the only thing the Court can do is to decree a sale of the vessel and divide the proceeds between the owners. ("Hughes on Admiralty," p. 297).

The cases upon this question are very few, and the text writers touch it but briefly. The reason is obvious, for it is very seldom that you get a case where there are equal part owners.

When the proper facts do present themselves in a case for partition and licitation, namely, equal part owners who can't agree and are in irreconcilable conflict and you obtain the jurisdiction of the United States District Court, two very important and interesting questions are presented.

First: Is a suit for partition and licitation of a vessel such a case that the claimant can give a bond and obtain a release of the vessel?

Second: Has the Court jurisdiction to order an accounting between the owners as a part of the suit for partition and licitation?

FIRST.

The first question is evidently one within the discretion of the Court, for in Supreme Court Rule 11, which is as follows:

"In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as afore-

said; and if the claimant shall decline any such application then the Court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such or otherwise dispose of, as it may deem most for the benefit of all concerned;" in the second line, the Supreme Court uses the word "may," and evidently intended by the use of this word that there were some cases where a bond should not be taken until the case was first presented to the court. It was contended in *The Emma B.*, 140 Fed. 770, a recent case argued in the United States District Court for the District of New Jersey which was a case for the partition and licitation of a schooner between equal part owners who were unable to agree upon the management and employment of the schooner, that this was a case where the discretion of the Court should be exercised in refusing to accept a bond, for what is asked for in such a case is that the vessel be sold and it is obvious that if any bonds are taken and the vessel released, the very thing which the Court is asked to partition would not be in the custody of the Court, and the only thing that would be left would be a piece of paper; but Judge Cross, who heard the case held that a bond might be given to the Marshal releasing the schooner, providing it contained a condition to re-deliver her to the Marshal within ten days after a decree of the Court, ordering the sale and partition.

In the case of *Burr v. The St. Thomas,* Fed Cas. No. 2194A, which was a case between equal owners who could not agree as to her control and employment, upon application to the court her sale was ordered with a division of the proceeds.

To the same effect is *The Vincennes,* Fed. Cas. No. 16944. In this case there were three part owners; one owned one-half and the other two one-quarter each. The owner of the one-half was in possession and was ship's husband, but the parties could not agree as to the voyage and upon application of the two one-quarter owners joining together, the vessel was ordered to be sold.

But in neither of these cases does it appear whether a request was made that the vessel be released on a bond during the pendency of the suit for licitation, so the decision of Judge Cross in *The Emma B.* evidently settles a novel question.

The text writers don't seem to express any opinion as to whether vessels under libel in a partition suit should be released on bonds as is the custom in other admiralty cases.

"Henry on Admiralty" comes perhaps the nearest of any to expressing an opinion, for he says at section 124, page 339, "but the claimant will not be entitled to have a vessel discharged from arrest where it would defeat the very object of the suit."

SECOND.

It is unquestionably the law that Admiralty will not take jurisdiction of mere matters of account, but in a suit for partition and licitation between equal part owners of which the Court has jurisdiction, it will order an accounting as incidental to the main action.

The reason for this must be apparent, for if a vessel were sold in a partition suit and the money paid into Court to be divided between the two owners and there are any liens against the vessel, such lienors would have the right to file petitions for the proceeds of the sale. This would be most unjust to the libellant to submit his part of the proceeds of the sale to payment of liens without first ascertaining whether there are earnings belonging to the vessel, for if there are, they should be applied to the payment of such liens before libellant's share of the proceeds of the sale is touched for such purposes. Then, too, it would be a very imperfect administration of justice to decree to the libellant in such case half of the proceeds of the sale of the vessel in the registry of the court without any account of the earnings of the vessel and leave him to bring a suit for an accounting in some other tribunal, which might be incompetent to do justice between the parties and consequently such suit would prove entirely ineffectual.

It is more than likely also that, if the libellant did obtain a judgment in some other court for an accounting, respondent would have put the money received from his share of the proceeds of the sale of the vessel beyond the reach of courts. Libellant would then be in this position. Supposing the respondent had been running the vessel for two or three years without rendering any account, his part of the proceeds of the sale might be partly used up to pay liens on the vessel, although there might be more than enough earnings due the vessel to pay such liens, and he would have to try to collect such earnings of the respondent in some other court when it might have all been settled in the partition suit where the proceeds of the sale of the vessel were, and where the respondent could have been denied the right to take his part of the proceeds of the sale of the vessel out of the registry of the Court unless he did render an account.

An interesting case on the question which has just been decided is *The Emma B.*, 140 Fed. 771. In this case, exceptions were filed to a libel for partition and licitation because an accounting was asked for incidentally to the main cause of action.

Judge Cross, in a very careful opinion in overruling the exceptions said:

"It is undoubtedly established that a Court of Admiralty has no jurisdiction of accounts as such, and will not take jurisdiction of a cause, solely for the purpose of decreeing an accounting, but I do not find any case which holds that where jurisdiction is acquired on valid grounds, and the accounting is merely incidental to the main relief, that such accounting will be denied. Indeed, it seems to be recognized in many cases that an accounting incidental to the main question, is not only permissible, but may even be essential to the proper administration of justice."

If the respondent in *The Emma B., supra,* had sold his interest even after the libel was filed, the libel against such respondent would be dismissed and with it of course, any right to an accounting against him in the action for partition. The reason for this is because just as soon as the respondent parted with his interest the Court lost jurisdiction so far as he was concerned, and losing jurisdiction of him in the partition suit it lost jurisdiction of compelling him to render an account, for Admiralty will not take jurisdiction simply of accountings. The buyer of his interest would stand in his place for all purposes both for the partition and the accounting, but the original respondent by selling his interest would practically defeat the action of accounting in the partition suit, because of course the vessel when under attachment would have earned nothing after he sold her. If what I have suggested should be followed by respondents in all actions for partition and licitation, libellants would practically be compelled to go to other tribunals to get an accounting in such cases.

In *The John E. Mulford,* 18 Fed. 445, an action was brought to obtain the partition and sale of a schooner between equal part owners. There were two respondents, one who was the former managing owner of the schooner, owning a half interest, and the one to whom he had sold his interest. Judge Brown, who for so many years presided over the Admiralty Court in the Southern District of New York, dismissed the action against the former managing owner because such action, so far as it applied to him, was for an accounting pure and simple and held that the Admiralty had no jurisdiction of such an action. But as to the other respondent, the owner, he held that the Court had jurisdiction to determine the account of the receipts of the vessel's earnings as an incident to the just distribution of the sale of the vessel now in the registry of the Court, and said upon this question at page 458 of the opinion:

"If, as is claimed by the libellant, this defendant has a consid-

erable sum in his hands as the proceeds of these earnings, it would be a very imperfect administration of justice to decree to the defendant the full half of the proceeds of the vessel in the registry without any account of the excess of her earnings belonging to the libellant already in this claimant's possession, and to turn the libellant over to a future and possibly ineffectual action in another court to recover these earnings. *There is no want of power as I understand, in this Court as a Court of Admiralty to take such an account as an incident to the principal cause of which it has undoubted jurisdiction when justice requires such an account in order to make a just distribution of a fund in the registry of the court."*

In *Davis v. Child,* Fed. Cas. No. 3628, 2 Ware, 78, it was held that Admiralty has no jurisdiction over matters of account merely as accounts, although they may arise exclusively out of maritime transactions. It can, however, take cognizance of accounts where they are incidental to other matters over which it has jurisdiction.

In the case of *Tunna v. The Betsina,* Fed. Cas. No. 14236, it was held that Admiralty will not order an account as a separate and independent mode of relief but will, where the same is only an incident to another matter of which it has admitted cognizance.

In the case of *The Larch,* Fed. Cas. No. 8086, 3 Ware, 34, it was held by Judge Ware that where there are accounts rising incidentally in the case, it is a question addressed to the sound discretion of the court whether it will take cognizance of the account or not. I speak of this case because from its citation in certain cases and text-books, it would appear that this case has been overruled on the point that admiralty will take cognizance of accounts where they are incidental to an action over which the Court has jurisdiction, but this is not so, and whatever may have been overruled in the case on appeal, this statement by Judge Ware, that Admiralty will consider accounts where they arise incidentally in a case over which the Court has jurisdiction was not, for Judge Curtis, hearing this case on appeal in the Circuit Court, Fed. Cas. No. 8085, 2 Curtis. 427, held that no lien exists in such cases unless the owners be also partners, and if it did exist it would not be enforced in Admiralty as a single and independent subject of account.

The text writers are in entire accord with the decisions, and hold that an account, as merely incidental to the sale and partition

of a vessel over which the Court has jurisdiction, should be determined in the same action.

"Henry on Admiralty" says the following at page 66:

"But in the exercise of this jurisdiction it may take an account when such accounting is only incidental, and an account can be taken of the vessel's earnings against a former managing part owner, who is also a claimant on the fund and entitled to share in the proceeds of the sale of a vessel under a decree in the case; as an incident to the just distribution of the proceeds." ("Benedict on Admiralty," p. 141-142, section 263a; "Hughes on Admiralty," p. 353-354, section 189).

The decisions I believe, follow what the Supreme Court evidently intended, that District Courts sitting in Admiralty should take equitable as well as legal action in the distribution of funds in the registry of the Court, for it provided for it in rule 43 when it said, "to proceed summarily to hear and decide thereon, and to decree therein according to law and *justice.*"

James D. Dewell, Jr.